

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

WENDY PETERSON,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 03-174-P-H</i>
)	
SCOTIA PRINCE CRUISES LIMITED,)	
)	
<i>Defendant</i>)	

**RECOMMENDED DECISION ON DEFENDANT’S MOTION FOR PARTIAL SUMMARY
JUDGMENT**

The defendant, Scotia Prince Cruises Limited, moves for summary judgment on Counts I-III, V, VII and VIII of the complaint and any claims for punitive damages asserted by the plaintiff. I recommend that the court grant the motion.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spiegel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

II. Factual Background

The defendant's statement of material facts includes the following appropriately-supported undisputed material facts.¹

The defendant operates the *M/S Scotia Prince* as a ferry between Portland, Maine and Yarmouth, Nova Scotia. Defendant's Statement of Material Facts ("SMF") (Docket No. 30) ¶ 1. Between 11 p.m. and midnight on July 13, 2002 the *Scotia Prince* was en route from Portland, Maine to Nova Scotia and was within three miles of the coast of Maine. *Id.* ¶ 3. The plaintiff claims that at that time, while a passenger on the *Scotia Prince*, she went to the upper deck of the vessel to smoke a cigarette; that a black man

¹ The plaintiff filed no opposing statement of material facts. Instead, she filed a series of documents on the first page of which she appended the designation "Statement of Facts." Exh. A to Objection to Motion for Partial Summary Judgment ("Opposition") (Docket No. 40). This filing does not begin to comply with the requirements of this court's Local Rule 56(c). The documents will be disregarded and the assertions in the defendant's statement of material facts will be deemed (continued on next page)

wearing a striped shirt and brown pants sat next to her; and that, after a brief conversation, he raped and robbed her. *Id.* ¶ 2. After the alleged incident, the plaintiff returned to her cabin and went to sleep. *Id.* ¶ 14. At approximately 6 o'clock the next morning, the plaintiff went to the reception desk to report a rape and robbery. *Id.* ¶ 15.

The plaintiff reported that her alleged assailant was a Jamaican crew member, whereupon the defendant's purser showed her passport photographs of all of the defendant's Jamaican crew members for identification purposes. *Id.* ¶ 16. The plaintiff identified Henry Duncan and, alternatively, Marvin Wilmot, as her assailant. *Id.* ¶ 17. The defendant then investigated the incident. *Id.* The defendant became satisfied that there was overwhelming evidence that neither Duncan nor Wilmot could possibly have been involved in an assault on the plaintiff during the late evening of July 13, 2002 because they were both undergoing random drug testing at the time. *Id.* ¶ 18. The plaintiff's complaint was also investigated by the Royal Canadian Mounted Police and the U. S. Federal Bureau of Investigation. *Id.* ¶ 19. No one other than the plaintiff has informed the defendant that there was any evidence that Duncan or Wilmot was involved in the alleged assault or that either man was suspected of the assault. *Id.* Neither Duncan nor Wilmot had any reason to be on the upper deck between 11 p.m. and midnight on July 13, 2002. *Id.* ¶ 22.

All crew members in 2002 received a copy of the Master's Rules and Regulations, which state, *inter alia*, that crew members must show respect and courtesy to passengers at all times. *Id.* ¶ 4. Any act of aggression by a crew member against a passenger has always been strictly prohibited. *Id.* ¶ 5. It is the defendant's policy to terminate immediately a crew member who visits a passenger or engages in improper

admitted insofar as they are supported by the stated citations to the summary judgment record. Local Rule 56(e).

behavior. *Id.* ¶ 6. The success of the defendant’s business depends substantially on the goodwill of passengers. *Id.* ¶ 7.

Before July 14, 2002 the defendant never received a report of an assault by an employee or crew member against a passenger. *Id.* ¶ 8. At no time prior to July 14, 2002 did the defendant have any reason to believe that any employee posed any risk to female passengers. *Id.* ¶ 9. While off duty, the defendant’s employees are not allowed to frequent any areas of the ship designated for passengers, including the upper deck. *Id.* ¶ 10. Crew members are required to be in uniform whenever on duty. *Id.* ¶ 12. No crew member in 2002 wore a uniform consisting of brown pants and a striped shirt. *Id.* ¶ 13. Any crew member wearing such an outfit on board the vessel would not have been on duty at the time. *Id.*

To support her misrepresentation claim, the plaintiff relies on a brochure she received containing the phrases “good times,” “to live it up,” “there’s fun to be had,” “enjoy a relaxing time,” and “just relax and admire the ocean.” *Id.* ¶ 26.

III. Discussion

A. Counts I, III, V and VIII

The defendant contends that Counts I, III, V and VIII of the amended complaint are predicated on its asserted strict liability for the intentional torts of its employee and that when such torts are outside the scope of employment strict liability does not attach. Defendant’s Motion for Partial Summary Judgment, etc. (“Motion”) (Docket No. 29) at 4. Count I alleges assault and battery, Count III alleges intentional infliction of emotional distress, Count V alleges conversion and Count VIII alleges breach of contract of carriage and “absolute vicarious liability.” Amended Complaint, etc. (Docket No. 23) at 3, 5, 7, 9. The plaintiff responds that strict liability is available under such circumstances. Opposition at 2-6. Both parties

rely on *Muratore v. M/S Scotia Prince, Inc.*, 845 F.2d 347, 353 (1st Cir. 1988). There is no need for me to reach the merits of these arguments, however.

As the defendant points out in its reply memorandum, Reply Memorandum in Support of Defendant's Motion for Partial Summary Judgment ("Reply") (Docket No. 41) at 3-4, the plaintiff's failure to file a response to its statement of material facts or a statement of additional material facts in her own behalf means that there is no evidence in the summary judgment record to support the necessary factual predicate for all of the counts at issue — that she was assaulted by an employee of the defendant. The defendant's statement of material facts states only that the plaintiff *claims* that she was assaulted and robbed. SMF ¶ 2. In its initial memorandum of law in support of the pending motion, the defendant "assum[ed] for the sake of argument that Plaintiff could meet her burden of showing that the alleged assault was committed by an employee of Defendant," Motion at 11, but nothing submitted by the defendant may reasonably be construed as an admission that the alleged assault and robbery in fact occurred. Under these circumstances, the plaintiff has failed to "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co.*, 200 F.3d at 2. Her failure to come forward with sufficient evidence to generate a trialworthy issue as to this essential factual element of each of the claims at issue, on all of which she would bear the burden of proof at trial, warrants summary judgment for the defendant on these counts. *In re Spiegel*, 260 F.3d at 31.

B. Count II

Count II alleges negligent infliction of emotional distress. Amended Complaint at 4. The defendant contends that this claim may not stand alone. Motion at 12-13. The plaintiff does not respond to the motion with respect to this count. The failure of the nonmoving party to respond to a summary judgment motion does not in itself justify summary judgment. *Lopez v. Corporación Azucarera de Puerto Rico*,

938 F.2d 1510, 1517 (1st Cir. 1991). “Rather, before granting an unopposed summary judgment motion, the court must inquire whether the moving party has met its burden to demonstrate undisputed facts entitling it to summary judgment as a matter of law.” *Id.* (citations, internal quotation marks and brackets omitted). I agree with the defendant that the plaintiff has failed to proffer evidence from which a reasonable factfinder could conclude that she is entitled to recover on this claim under Maine law as either a bystander or one who has a special relationship with the defendant. *Curtis v. Porter*, 784 A.2d 18, 25-26 (Me. 2001). *See also Veilleux v. National Broad. Co.*, 206 F.3d 92, 131 (1st Cir. 2000). This claim also requires evidence that an assault took place, and for the reasons discussed above the defendant is entitled to summary judgment on this court for that reason as well.

C. Count VII

Count VII asserts a claim for “common law misrepresentation.” Amended Complaint at 8-9. The defendant contends that the count as pleaded fails to state a claim on which relief may be granted because it does not allege either that misrepresentations were made with an intent to deceive or that they were made negligently. Motion at 13-14. In addition, it contends that the promotional materials at issue are insufficient to provide the basis for a misrepresentation claim. *Id.* at 14. The plaintiff responds that certain representations were made on the defendant’s website, although she does not suggest how or why these representations were false or misleading. Opposition at 6-7. In any event, none of the representations on which the plaintiff relies is properly before the court in the summary judgment record.² To the extent that she may be construed as relying as well on factual statements included in the defendant’s statement of

² The defendant’s statement of material facts includes the assertions that “Plaintiff is not aware of any facts to support the allegation that Defendant affirmatively and intentionally misrepresented any aspects of the crews;” “Plaintiff is unable to point to any promotional material of Defendant in which the *Scotia Prince* is called ‘the safest place in the world’;” and “[t]o support her misrepresentation claim, Plaintiff relies on a brochure she received containing the phrases ‘good times,’” (continued on next page)

material facts, *see* SMF ¶ 26, I find that none of those representations could provide the basis for a claim of misrepresentation under Maine law. *Uncle Henry's Inc. v. Plaut Consulting Inc.*, 240 F.Supp.2d 63, 85-87 (D. Me. 2003). The defendant is entitled to summary judgment on Count VII.

D. Punitive Damages

The defendant cites *Muratore* in support of its contention that punitive damages are not available against a ship owner for an employee's intentional torts unless the tortfeasor was a managerial agent or the ship owner authorized or ratified the misconduct. Motion at 13. Again, the plaintiff does not respond to this argument. The First Circuit did hold in *Muratore* that the ship owner could not be held liable for punitive damages unless the employee-tortfeasor were a managerial agent, it authorized or ratified the tortious behavior, it had reason to suspect or was aware of such misconduct before it took place or it failed to take appropriate action after learning what had happened. 845 F.2d at 356. The summary judgment record does not include any evidence that would allow a reasonable factfinder to conclude that any of these conditions was met; indeed, as discussed above, the record is devoid of evidence that a tort occurred. The defendant is entitled to summary judgment on any claim for punitive damages.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for partial summary judgment be **GRANTED**. If the court adopts my recommendation, summary judgment for the defendant will be entered on Counts I-III, V, VII and VIII of the amended complaint as well as any claim for punitive damages.

NOTICE

'to live it up,' 'there's fun to be had,' 'enjoy a relaxing time,' and 'just relax and admire the ocean.'" SMF ¶¶ 24-26.

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 2nd day of June, 2004.

/s/ David M. Cohen

David M. Cohen

United States Magistrate Judge

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